STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees
and Cross-Appellants,

v

MEMORIAL HOSPITAL, d/b/a MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C. and SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

Defendants-Appellants
and Cross-Appellees.
_____/

Supreme Court No. 129134

Court of Appeals
Docket No. 25110

Shiawassee Circuit
Court No. 01 007289 NH

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_____/

129134 (104)

NOTICE OF HEARING

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF ON BEHALF OF CITIZENS FOR BETTER CARE IN SUPPORT OF PLAINTIFF'S CROSS-APPLICATION FOR LEAVE TO APPEAL

9/27

(13)

Citizens for Better Care, by and through its attorneys, OLSMAN, MUELLER & JAMES, P.C., hereby move this Court for leave to file a brief as *amicus curiae* in the matter of *Apsey v. Memorial Hospital, et al.*, and states the following in support of

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its motion in support of plaintiff's Cross-Application for Leave to Appeal:

1. Citizens for Better Care is a well-known consumer advocacy and information agency which exists for the purpose of improving the overall quality of care for all of Michigan's nursing home residents. Citizens for Better Care is actively concerned with court decisions which impact the rights of nursing home residents in Michigan.

2. The issues in this case are important to the jurisprudence of the State, and the resolution is likely to have a direct and substantial impact on the rights of nursing home residents who have been or are victims of nursing home malpractice and their families. The *Apsey* decision also has impact on the validity of wills, trusts and durable powers of attorney executed by nursing home residents as well as other Michigan citizens if notarized out of state and not certified pursuant to MCL 600.2102.

3. This brief of *amici curiae* is being filed at the same time as the party whose position is being espoused that of Plaintiff-Appellees/Cross-Appellants in support of their cross-appeal. MCR 7.306(D).

4. As friends of the Court and not having been previously involved in the litigation, the *amici curiae* will be able to bring a different and broader perspective to the Court than the parties which will assist the Court in deciding this matter.

WHEREFORE, the *amici curiae* Citizens for Better Care hereby requests that this Honorable Court enter an order granting *amici curiae's* Motion for Leave to File *Amici Curiae* Brief, accept for filing *amici curiae's* Brief submitted with this Motion in Support of Plaintiff's Cross-Application for Leave to Appeal and grant such additional relief as the Court deems just and equitable.

OLSMAN, MUELLER & JAMES, P.C.

By _____
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Dated: September 13, 2005

STATE OF MICHIGAN

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MEMORIAL HOSPITAL, d/b/a MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C. and SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

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NOTICE OF HEARING

TO: Clerk of the Court
Counsel of Record

PLEASE TAKE NOTICE that the Motion for Leave to File *Amici Curiae* Brief on Behalf of Citizens for Better Care in Support of Plaintiff's Cross-Application for Leave to Appeal will be brought on for hearing on Tuesday, September 27, 2005.

OLSMAN, MUELLER & JAMES, P.C.

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Dated: September 13, 2005

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AFFIDAVIT OF JULES B. OLSMAN

STATE OF MICHIGAN)
) ss:
COUNTY OF OAKLAND)

JULES B. OLSMAN, being first duly sworn, deposes and states:

1. I am the attorney for *amici curiae* in the above-entitled cause of action.

2. I have read the foregoing Motion by me subscribed, and the facts set forth therein are true to the best of my knowledge and belief.

JULES B. OLSMAN

Subscribed and sworn to before me
this 14th day of September, 2005

Barbara L Bound
Notary Public

BARBARA L. BOUND
NOTARY PUBLIC, STATE OF MI
COUNTY OF OAKLAND
MY COMMISSION EXPIRES Aug. 25, 2010
ACTING IN COUNTY OF

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STATEMENT OF QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN ITS DETERMINATION THAT A DULY NOTARIZED OUT-OF-STATE AFFIDAVIT IS INVALID UNLESS THE NOTARY'S SIGNATURE IS CERTIFIED IN ACCORDANCE WITH MCL 600.2102?**

Plaintiff-Appellees answer "yes."

Defendants-Appellants answer "no."

The Court of Appeals answered "no."

Amici Curiae answer "yes."

II. **DID THE COURT OF APPEAL ERR IN REVITALIZING AN ARCHAIC PRACTICE WHICH HAS NOT BEEN PART OF THE AFFIDAVIT PRACTICE OF LAW IN THIS STATE, IN ANY AREA OF ENDEAVOR, FOR DECADES?**

Plaintiff-Appellees answer "yes."

Defendants-Appellants answer "no."

The Court of Appeals answered "no."

Amici Curiae answer "yes."

STATEMENT OF FACTS

Amici Curiae, Citizens for Better Care, accepts the Statement of Facts asserted by Plaintiff-Appellees/Cross-Appellants.

DESCRIPTION OF THE *AMICI CURIAE*

Citizens for Better Care is a well-known consumer advocacy and information agency which exists for the purpose of improving the overall quality of care for all of Michigan's nursing home residents. Citizens for Better Care is actively concerned with court decisions which impact the rights of nursing home residents in Michigan.

INTRODUCTION

The case at bar has broad-reaching implications for all citizens of Michigan including residents of long-term care facilities. If it stands, *Apsey* will adversely impact the ability of Michigan's citizens, including long-term care residents and their families, to enforce legal instruments executed out of state including wills, trusts and durable powers of attorney. It will likewise lead to a needless expenditure of time, energy and money to ensure an archaic technical requirement that has long been abandoned by lawyers in various area of practice who regularly submit out-of-state affidavits in judicial proceedings. The Court should review and reverse the Court of Appeals determination that MCL 600.2102 alone governs the authentication of an affidavit signed outside the State of Michigan if the affidavit is to be read by the judiciary. The only correct legal action in this case is that which removes the burden of complying with the archaic and costly technical requirements of MCL 600.2102 as was clearly intended by the Michigan Legislature when it adopted the Uniform Recognition of Acknowledgments Act, MCL 565.261, *et seq.*

Citizens for Better Care hereby endorses the positions and arguments forwarded by Plaintiffs-Appellees and the other *amici curiae* who have filed supporting motions and briefs.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN HOLDING THAT MCL 600.2102 TRUMPS THE UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT, MCL 565.261 *ET SEQ.*

In *Apsey v. Memorial Hospital*, Docket No. 251110, decided April 19, 2005, (hereinafter "*Apsey I*"), plaintiffs filed their medical malpractice complaint with an affidavit of merit signed by an expert from Pennsylvania. The affidavit was sworn before a notary of the State of Pennsylvania. The Court of Appeals acknowledged that "Plaintiffs' affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. This status in another state carries over to this state, and the signature and title are *prima facie* evidence of authenticity, MCL 565.263(4)." ("*Apsey I*", Exhibit 1, p. 2).

The Court of Appeals went on to hold, however, that MCL 600.2102, which requires a special certification when an affidavit is to be officially received and considered by the judiciary, controls over the more general requirements of MCL 565.272. Finding that plaintiffs' failure to submit the additional certification called for by MCL 600.2102, the Court of Appeals concluded that this defect rendered the entire case a nullity and that plaintiff could not claim the benefit of statutory tolling.

In *Apsey v. Memorial Hospital*, Docket No. 251110, on reconsideration, June 9, 2005, (hereinafter "*Apsey II*") (Exhibit

2), the Court of Appeals by a 2-1 decision reaffirmed "that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 565.262." (*Id*, at 5). However, the majority, basing its decision in part upon *amicus* briefs filed by Citizens for Better Care and others, ruled that the decision would have prospective application only. (*Id*, at 7). While this meant that plaintiff Apsey's case would be reinstated and that the trial court order granting defendant's motion for summary disposition would be reversed, the court went on to hold that:

> With regard to all medical malpractice cases pending where plaintiffs are not in compliance with MCL 600.2102(4), on the basis of justice and equity, plaintiffs can come into compliance by filing the proper certification. But justice and equity also dictates a strict application from the date of this opinion. From the date of the issuance of this opinion, any affidavit of merit acknowledged by an out of state notary filed without the proper certification will not toll the statute of limitations because the legal community is now on notice. (*Id*, at 8).

A. The Court of Appeals Erred in Concluding that Only MCL 600.2102 Applied to This Case

In its June 9, 2005 opinion, the Court of Appeals began its analysis by examining the text of the URAA and MCL 600.2102. Based on that review, the Court of Appeals majority concluded that the affidavit in question met all of the requirements set forth in the URAA but did not satisfy the additional certification called for by MCL 600.2102:

> **If the present inquiry were to be decided on the basis of the URAA, the notarization of the affidavit in question would indisputably be valid.** Plaintiff's affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. That status in another state carries over to this state, and the signature and title are *prima facie* evidence of authenticity, MCL 565.263(4). **But the signature and notary seal do not satisfy the requirements set forth in MCL 600.2102(4).** (Opinion, Exhibit 2, p. 3) (emphasis added).

The *Apsey* court went astray by failing to follow principles of statutory construction in its attempt to reconcile the two statutes. The Court of Appeals ruled that the two statutes could be "harmonized" as follows:

> The two statutes can be harmonized. The URAA provides in pertinent part, "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." MCL 565.268. The legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993); *Kalamazoo v KTS Industries, Inc.*, 263 Mich App 23, 34; 687 NW2d 319 (2004). MCL 600.2102 is a law of this state that requires more specific recognition requirement of notarial acts authenticating an affidavit of a person residing in another state that is received in judicial proceedings; i.e., it requires that the signature of a notary public on an affidavit taken out of state "be certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." As such, the URAA, enacted after MCL 600.2102, does not diminish or invalidate the more specific and more formal requirements of MCL 600.2102. Furthermore, this harmonious application of the URAA and MCL 600.2102 avoids conflict. (*Id* at pp. 4-5).

In its attempt to bring harmony to the two statutes, the Court of Appeals inappropriately rewrote the URAA making it inapplicable to affidavits received and considered by a court. *Amici* do not dispute that a court faced with potentially conflicting statutes must "endeavor to read them harmoniously and to give both statutes a reasonable effect," *House Speaker v State Administrative Board*, 441 Mich 547, 568; 495 NW2d 539 (1993); *People v Webb*, 458 Mich 265, 273-274; 580 NW2d 884 (1998); *Wayne County Prosecutor v Department of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996), it is absolutely clear that the method used by the Court of Appeals to arrive at its "harmonious" reading of these two statutes was completely wrong.

This Court has made it clear that a court engaged in interpreting and applying a statute is not free to rewrite that statute. *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002) (statutes are to be applied "as enacted without addition, subtraction or modification."); *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 311; 596 NW2d 591 (1999). As this Court observed in *State Farm Fire & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002), "because the proper role of the judiciary is to interpret, not write the law, courts do not have authority to venture beyond the unambiguous text of a statute." These fundamental principles with respect to the interpretation of statutes, which are ultimately grounded in constitutional imperatives, *People v. McIntire*, 461 Mich 147,

153; 599 NW2d 102 (1999); *Robertson v DaimlerChrysler*, 765 Mich 723, 758; 641 NW2d 567 (2002), must also apply where a court seeks to harmonize two statutes.

Just as a court engaged in an effort to harmonize two statutes is not free to rewrite those statutes, likewise, a court does not have the authority to negate the language of one of the statutes, thereby rendering a portion of the statute to be without effect. As expressed by this Court in *State Treasurer v Schuster*, 456 Mich 408, 419; 572 NW2d 628 (1998), a harmonious reading of two statutes must be accomplished "without rendering an irrelevant provision surplusage or nugatory." In fact, as this Court indicated in *House Speaker, supra,* a court striving to read two statutes harmoniously is compelled to give both statutes a reasonable effect. *Id* at 568.

The Court of Appeals plainly failed to abide by these basic principles of statutory construction in "harmonizing" the URAA and MCL 600.2102 as it did. The plain language of MCL 565.268 clearly states that, for those choosing to do so, the requirements of MCL 600.2102 can continue to be met. "This act provides an <u>additional</u> method of proving notarial acts." Because there is no provision in MCL 600.2102 clearly establishing that it is to be the exclusive method of proving notarial acts, the sections can be read in harmony by allowing either to be done. The *Apsey* majority's decision to "harmonize" the two statutes by making the URAA completely inapplicable to affidavits received

and considered by a court is both nonsensical and illogical. The fundamental error made by the Court of Appeals in this case is aptly demonstrated in the Arkansas Supreme Court's decision in *Rumph v Lester-Land Co,* 205 Ark 1147; 172 SW2d 916 (1943), a decision with obvious similarities to this case. In 1943, Arkansas adopted the 1939 version of the Uniform Acknowledgments Act. That uniform act, like the URAA, indicated that it provided a method of validating out-of-state affidavits which was in addition to those previously recognized under the adopting state's laws.

In *Rumph, supra,* the Court had to consider a potential conflict between estate law which predated the Uniform Acknowledgments Act and that uniform act. One of these statutes required an additional certification while the other did not. The Arkansas Supreme Court examined the history and language of the model act and came to the conclusion that both statutes remained in effect and that compliance with either established the validity of the acknowledgment in question:

> We hold that [the Uniform Acknowledgments Act] did not repeal, change, modify or in any way impair any law of this state; but provided only an alternative system for acknowledgments. In other words, [the Uniform Acknowledgment Act] is merely permissive. Acknowledgments may still be taken, certified and authenticated just as heretofore; on the other hand, acknowledgments may be taken, certified and authenticated under the Uniform Acknowledgments Act . . . two ways are open: (1) the old way; or (2) the way under Act 169 of 1943. Either way reaches the same goal: i.e., the right to be recorded. 172 SW2d at

> 918. As the *Rumph* court recognized, there was no conflict between existing law and the Uniform Act because, under the text of that uniform act, both methods for validating an acknowledgment still applied.

The Court of Appeals herein committed obvious error when it failed to apply the clear wording of MCL 565.268. The court should have ruled that the methods for recognizing the validity of affidavits signed in another state under the URAA were in addition to those prescribed in MCL 600.2102.[1] See *Fireman's Fund Insurance Company v Harold Turner, Inc.*, 159 Mich App 812, 816-817; 407 NW2d 82 (1987) (concluding that two potentially conflicting statutes could be construed harmoniously as supplementary where one of those statutes specified "in addition to any other liability imposed by this act or other law.")

The Court of Appeals in this case not only had a clear method of harmonizing the URAA and MCL 600.2102, but it had a clear method of harmonizing these statutes which was expressly dictated by the Michigan Legislature. The *Apsey* court seriously erred when it failed to conclude that the two statutes involved

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[1] The Prefatory Note's indication that the URAA was to be supplemental to any existing state law is entirely consistent with general Michigan law regarding the construction of potentially conflicting statutes. Michigan courts have long held that in attempting to construe competing statutes as consistent, "the courts will regard all statutes on the same general subject as part of one system and later statutes will be construed as supplementary to those preceding them." *People v Buckley*, 302 Mich 12, 22; 4 NW2d 22 (1942); *D.P.O.A. v City of Detroit*, 391 Mich 44, 65 n. 12; 214 NW2d 808 (1974). Thus, even without MCL 565.268's clear indication that the URAA was to supplement existing law, this Court would be compelled by general Michigan law to construe it as such.

in this case did not conflict because, under MCL 565.268, both applied to this case and plaintiff's affidavit should have been deemed valid under Michigan law if it satisfied either the URAA or MCL 600.2102. Instead, without authority, the *Apsey* court dramatically reduced the scope of the URAA rendering a uniform act which by its express wording was designed to govern all notarial acts performed outside the State of Michigan inapplicable in the one setting where such acts are most frequently employed, i.e., in court proceedings. The implications of the decision are horrendous.

B. The Majority's Decision in *Apsey* will have a Devastating Effect on the Entire Practice of Law in the State of Michigan

Attorneys in Michigan have been required to file affidavits of merit in support of medical malpractice cases since 1994. They have uniformly viewed the URAA as providing an additional method of proving the validity of an out-of-state affidavit sworn before a foreign notary public. They have read the URAA as obviating the need to obtain formal certification of that notary's authority, title and signature. In fact, this interpretation of the URAA conforms with the practice of lawyers in other areas of the law who regularly submit out-of-state affidavits in judicial proceedings. It would be fair to say that the overwhelming practice of Michigan lawyers is to submit such affidavits so as to conform to the URAA, rather than the archaic, needless requirement of 2101.

Interestingly, this interpretation of the URAA was shared by a respected tableau of circuit court judges in this State. Other than a single federal trial court decision that an uncertified affidavit of merit was void (but which did not consider the URAA on the question), almost all the circuit court judges who have considered the issue have agreed that the certification requirements of MCL 600.2102 are trumped by the clear and unambiguous provisions of the URAA. Not surprisingly, the *Apsey* decision came as a stunning blow to everyone who had concluded that an out-of-state affidavit of merit need not be certified to be deemed valid in this State. The implications of the *Apsey* decision are horrendous. If the majority decision stands, and is given retroactive effect as is argued in defendant's Claim of Appeal, then hundreds of medical malpractice cases pending in the courts of this State are at risk of being tossed out because of this technical objection. Likewise, a large number of affidavits of meritorious defense, filed on behalf of medical malpractice defendants, will also immediately be rendered nonconforming. The ripple effect of the decision could cast doubt upon all ongoing, and recently concluded, litigation in which out-of-state affidavits were submitted. Attorneys in all areas of practice might face liability for the mere act of believing that the URAA, and the weight of circuit court decisions, were a reliable guide to their conduct in litigating these claims.

Although the *Apsey II* majority was careful in attempting to limit its decision interpreting the relative effects of MCL

600.2102 and the URAA to the area of medical malpractice affidavits of merit, nothing in the statute compels this limitation. Indeed, it is to be anticipated that the cautious practitioner would from this point on automatically follow the rigorous requirements of MCL 600.2102, for fear that the affidavit would eventually become potentially actionable in judicial proceedings, and that the affidavit would be found to be deficient absent such certification. Similarly, those opposing affidavits would feel pressure placed upon them to challenge the technical requirement of a certification any time an affidavit comes into play. This would work great mischief, and place a great burden, upon the effective administration of justice in this State, in this era of interstate, and, indeed, international, interdependence.

CONCLUSION

Based upon the above arguments and authorities, the *amici curiae* Citizens for Better Care respectfully requests that this Honorable Court reverse the majority decision in the case *Apsey v Memorial Hospital*, and instead adopt the dissenting opinion, so as to hold that the provisions of MCL 600.2102 are not the sole means of proving the authenticity of an out-of-state notarized affidavit, and that the provisions of the Uniform Recognition of Acknowledgments Act, MCL 565.261, *et seq.*, verify the authenticity of the affidavit of merit submitted by Plaintiff/

Cross-Appellant.

OLSMAN, MUELLER & JAMES, P.C.

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